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A Borrower May Not Bring An Action To Determine Whether The Owner Of A Mortgage Note Has Authorized A Nonjudicial Foreclosure

Civil Code sections 2924 to 2924k provide a comprehensive framework for regulating nonjudicial foreclosure sales under deeds of trust. A recent decision by the California Court of Appeal (4th Dist.) finds that, under California's statutory framework regulating nonjudicial foreclosures, borrowers cannot challenge the authority of a trustee, mortgagee, beneficiary, nominee, or other agent of the lender or holder of the note to pursue nonjudicial foreclosure. To hold otherwise would, "fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosure."

In *Gomes v. Countywide Home Loans, Inc.*, 192 Cal.App.4th 1149 (2011), the California Court of Appeal affirmed the lower court's decision to sustain defendants' demurrer without leave to amend. At the lower court, plaintiff attempted to plead a cause of action for wrongful foreclosure by alleging that MERS (the nominee of the note holder) "did not have authority to initiate the foreclosure because the current owner of the note did not authorize MERS to proceed with the foreclosure." Plaintiff also pled a related cause of action for declaratory relief asking the court to determine whether Civil Code section 2924(a) allows a borrower, before his or her property is sold, to bring a civil action in order to test whether the person electing to sell the property is authorized by the note holder to foreclose the property. The Court of Appeal found that a borrower cannot bring such claims.

The Court of Appeal held that California's nonjudicial foreclosure statute does not require a nominee of a note holder to demonstrate that it is authorized to initiate a foreclosure. "Because California's nonjudicial foreclosure statute is unambiguously silent on any right to bring the type of action identified by Gomes, there is no basis for the courts to create such a right." To recognize such a right "would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy."

Moreover, the Court of Appeal rejected plaintiff's argument that, by "necessary implication," Civil Code section 2924(a) created a cause of action to test whether the person initiating the foreclosure has the authority to do so. The plain language of the statute states that a "trustee, mortgagee, or beneficiary, or **any of their authorized agents**" may initiate the foreclosure process. As nominee of the note holder, MERS was authorized to initiate foreclosure.

This decision reaffirms the comprehensive nature of the statutory scheme in California for nonjudicial foreclosure. It clarifies that, under California law, a borrower may not bring suit to determine whether the nominee or other agent of the note holder has authority to proceed with a foreclosure. Certain dicta, however, leaves open the possibility that California may recognize a cause of action when a borrower can actually allege facts showing that the wrong party initiated the foreclosure process. *See Ohlendorf v. Am. Home Mortgage Servicing* (E.D. Cal.) 2010 U.S. Dis. Lexis 31098. To eliminate risk, lenders should include language in the deed of trust explicitly permitting the nominee to foreclose through the power of sale provision and giving the nominee the right to conduct the foreclosure process under Civil Code section 2924.

Gomes v. Countywide Home Loans, Inc., 192 Cal.App.4th 1149 (2011)

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